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SUPREME COURT, U.S.

No. 06-1499

IN THE

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADECCO USA, INC.

CURTIS L. MACK
Counsel of Record
BRENNAN W. BOLT
McGUIREWOODS LLP
Attorneys for Respondent Adecco USA, Inc.
1170 Peachtree Street NE
Suite 2100
Atlanta, Georgia 30309
(404) 443-5500

210948

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether this case presents an appropriate vehicle for resolving the conflict among the lower federal courts regarding the proper standard of "direct evidence" to be applied in employment discrimination cases?

2. Whether there is a split in the circuits regarding the interpretation of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ____, 126 S. Ct. 2405 (2006), with respect to what constitutes an adverse act of retaliation under Title VII of the Civil Rights Act of 1964, § 2000e-3(a)?

3. Whether the Eleventh Circuit complied with this Court's previous remand?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Adecco USA, Inc., is wholly owned by Adecco, Inc. and its ultimate parent is Adecco SA, a foreign corporation.

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INTRODUCTION

With respect to the first issue identified by Petitioner, this case is not an appropriate vehicle to resolve the apparent split among the federal courts concerning the proper standard of "direct evidence" to be applied within the context of an employment discrimination case. The principal reason that this matter is not properly postured to resolve this conflict is that the evidence which Petitioner relies upon as direct evidence of retaliation is in fact inadmissible hearsay, and Petitioner never argued to the courts below that she had direct evidence of constructive discharge or sexual harassment. Accordingly, Petitioner is precluded from making such an assertion at this time. Moreover, there are other independent grounds for dismissing Plaintiff's claims. Complicating the issue further is the fact the Court cannot reach this issue without overturning fact findings adverse to Petitioner. This case is also not proper for resolving the split in the circuits because it is not binding precedent as the Eleventh Circuit's opinion in the case *sub judice* is unpublished in the Federal Reporter.

As to the second issue stated in the petition, there is no conflict among the circuits regarding the interpretation of *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. __, 126 S. Ct. 2405 (2006), with respect to what constitutes an adverse act of retaliation under Title VII of the Civil Rights Act of 1964, § 2000e-3(a). Rather, the Eleventh Circuit expressly adopted and applied the standard set forth by this Court in *White* for retaliation cases. Even if there was a conflict among the circuits, which Respondent denies, the Court should deny the Petition for Writ of Certiorari because the Court's decision in *White* is relatively recent and the courts of appeals have not yet had an opportunity to resolve any inconsistencies in their jurisprudence.

It is clear that Petitioner's request for certiorari is largely founded on her dissatisfaction with the lower courts' findings of fact and their application of extant law in this case. Contrary to Supreme Court Rule 10, the Petition for Writ of Certiorari asks this Court to make evidentiary rulings and reverse the factual findings made by the courts below. In support of this inappropriate request, Petitioner relies on evidence that the courts below correctly determined was inadmissible hearsay. Accordingly, the instant Petition for Writ of Certiorari should be denied in its entirety.

STATEMENT OF CASE

In this case Petitioner alleged sexual harassment, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended, and in violation of the Florida Civil Rights Act. None of Petitioner's claims survived at the district court level. On appeal, the Eleventh Circuit Court of Appeals ("Eleventh Circuit") affirmed the United States District Court for the Southern District of Florida's ("District Court") dismissal of Petitioner's claims on summary judgment.

District Court Proceedings

Respondent Adecco filed a Motion for Summary Judgment on May 1, 2003 and Motorola filed its Motion for Summary Judgment on May 5, 2003. The District Court heard oral argument on the Motions on August 22, 2003. After deliberating for seven months, the District Court granted the motions, dismissing Petitioner's claims for hostile environment harassment, retaliation, and constructive discharge in their entirety.

With respect to its decision to dismiss Petitioner's hostile environment claim, the District Court relied upon *Mendoza v. Borden Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999), setting forth the elements for a *prima facie* case[1] of hostile environment harassment. Using this standard and applying it to the facts in a light most favorable to Petitioner,[2] the District Court found that Petitioner failed to establish a *prima facie* case of sexual harassment. (R3-153-14-19). For example, many of the alleged harasser's comments, such as mentioning strip clubs to male and female coworkers alike and calling Petitioner's boyfriend a "dog," were not based on Petitioner's sex as required by *Mendoza*. Likewise, the District Court concluded that the alleged instances of touching and other conduct by the alleged harassers were not so "frequent, severe, or pervasive to constitute actionable sexual harassment. . . ." (R3-153-23). Accordingly, the District Court dismissed Petitioner's sexual harassment claim and granted summary judgment in Respondents' favor.

With respect to her retaliation claim, Petitioner argued in response to Respondents' motions for summary judgment that she had direct evidence of retaliation. Specifically, Petitioner alleged that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to become a permanent Motorola employee and that Motorola would not hire her because she "complained too much." (R2-78-167-70, R2-79-268-70). Both Respondents argued that such

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1. Petitioner never asserted to the District Court that she had direct evidence of sexual harassment and, as such, the District Court applied analysis appropriate for a circumstantial case of harassment.

2. The facts that the District Court relied upon can be found in the record at R3-153-2-9.

evidence was hearsay and, therefore, not admissible, reliable or probative of Petitioner's retaliation claim. Ultimately, the District Court rejected Petitioner's direct evidence argument because it made a factual determination that Petitioner was never denied a permanent position:

> [T]here is no evidence that Bussell was denied a permanent position at Motorola. Evidence has been submitted which shows that Bussell was never eligible for and thus, was never denied a permanent position at Motorola. The fact that she may have wanted or even expected to receive a permanent position at some time in the future is irrelevant.

Thus, Petitioner's retaliation claim was dismissed by the District Court along with her other claims. (R3-153-22-23).

Appellate Court Proceedings

On appeal to the Eleventh Circuit, Petitioner asserted, by brief and in oral argument, that the District Court's decision dismissing all of her claims was erroneous. Specifically, Petitioner argued that the District Court erred when it found that the record did not support a finding that the alleged harassment was sufficiently severe or pervasive to be actionable. Petitioner further argued that the District Court erred in failing to find direct evidence of retaliation and in dismissing her constructive discharge claim.[3]

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3. Again, Petitioner never alleged she had direct evidence of sexual harassment or constructive discharge.

A three-judge panel of the Eleventh Circuit reviewed the case *de novo*. Based on its factual findings[4] and relying on *Gupta v. Florida Board of Regents* , 212 F.3d 571 (11th Cir. 2000), the three-judge panel decided, *per curiam*, that Petitioner had failed to establish a *prima facie* case of hostile environment harassment. Key to its reasoning, the panel opined that many of the comments made by the alleged harasser in the workplace were made to men and women alike, and, therefore, were not based on Petitioner's sex. The panel further noted that 10-16 alleged instances of touching by a co-worker over the period of several months were not severe or pervasive enough to constitute actionable harassment. The panel also noted that many of the cases cited by Petitioner involved harassment by a supervisor, not by a coworker, and that Petitioner failed to provide "an analogous holding that such alleged behavior is sufficiently severe or pervasive to constitute a hostile workplace sexual harassment claim." *Bussell*, 141 Fed. Appx. at 823.

Petitioner also argued to the panel that she had direct evidence to support her retaliation claim. The panel, however, affirmed that there was no error by the District Court in rejecting Petitioner's retaliation claim, stating "there is no record evidence to support Bussell suffered from an adverse action by either of the defendants." *Id.* The panel did not elaborate further, and simply concurred and affirmed the District Court's analysis and decision regarding the retaliation claim. Accordingly, in an *unpublished* decision, the panel affirmed the district court's grant of summary judgment. Finally, the Eleventh Circuit rejected Petitioner's request for rehearing *en banc*.

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4. The facts that the Eleventh Circuit found probative appear at *Bussell v. Motorola, Inc.*, 141 Fed. Appx. 819, 820-22 (11th Cir. 2005).

Petitioner then filed a petition for writ of certiorari with this Court. On October 2, 2006, the Court granted the petition for writ of certiorari vacating the judgment and remanding to the Eleventh Circuit "for further consideration in light of *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. __ (2006)." (Petition for Cert. at 3a). On remand and in another *unpublished* decision, the Eleventh Circuit acknowledged the Court's remand, reevaluated the facts in light of this Court's holding in *White*, and held that its previous decision was not affected by *White*:

> In [*White*, the Supreme Court] held that "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace," and "the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." . . . Neither holding applies to Bussell's appeal. The only alleged retaliatory acts of which Bussell complained were either employment related, and the alleged retaliatory acts were either not retaliatory or were not acts that "would have been materially adverse to a reasonable employee."

(Petition for Cert. at 2a). This Petition for Writ of Certiorari ensued.

REASONS FOR DENYING THE PETITION

I. THIS CASE CANNOT RESOLVE "DIRECT EVIDENCE" SPLIT

There does appear to be a split among the federal circuit courts of appeal and lower federal courts as to what constitutes "direct evidence" in the context of an employment discrimination case; however, this case is not properly postured to resolve the conflict because Petitioner's so-called "direct evidence" of retaliation is inadmissible hearsay. Furthermore, Petitioner never asserted below that she had direct evidence of constructive discharge and sexual harassment and, therefore, cannot propound such argument at this time. Moreover, the Court would have to make evidentiary rulings and overturn fact findings adverse to Petitioner to address this issue, and the Eleventh Circuit's decision is unpublished in the Federal Reporter. Thus, as explained more fully below, this case does not provide an appropriate vehicle for resolving the circuit split regarding the proper standard of "direct evidence."

A. PETITIONER'S "DIRECT EVIDENCE" IS INADMISSIBLE.

Petitioner alleges that she was told by Tom Karge, her Adecco first line supervisor, that Laila Pennington, her Motorola first line supervisor, had made it impossible for her to advance and that Respondent Motorola would not hire her permanently because of her complaints. (R2-78-167-70, R2-79-268-70). This constitutes the entire scope of Petitioner's "direct evidence" of retaliation. On it is face, this purported statement is inadmissible hearsay within hearsay. *Halloway v. Milwaukee County*, 180 F.3d 820, 825

(7th Cir. 1999) (multilevel statement was inadmissible hearsay because the employees informing the plaintiff of the alleged discriminatory statement did not act within their scope of duties in reporting the statement to the plaintiff); *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1002 (3d Cir. 1988) (same); *Cedeck v. Hamiltonian Federal Savings & Loan Association*, 551 F.2d 1136 (8th Cir. 1977) (statement by manager was inadmissible hearsay because it contained a reiteration of what an unknown person told him). Furthermore, Karge, an Adecco employee, cannot make an admission on behalf of Respondent Motorola or vice versa. *See Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1092 (9th Cir. 1990) (multiple hearsay testimony about what a supervisor for one defendant was told by an executive regarding what the executive was told by another defendant was inadmissible); *Watson v. Adecco Employment Services, Inc.*, 252 F. Supp. 2d 1347, 1352-53 (M.D. Fla. 2003) (Adecco representative's purported statement to temporary workers that Adecco's client did not want them to return to work was inadmissible hearsay). Indeed, Petitioner admitted that no one at Motorola ever told her she would not become a permanent employee. (R2-78-167-70, R2-79-268-70). Therefore, the statement is inadmissible and was properly discounted by the lower courts in this case.

Even without regard to the inherent hearsay problems associated with the statement asserted above, Petitioner's retaliation claim would still fail on entirely independent grounds. First, there was no evidence in the record that Motorola or Adecco made any decision regarding a permanent

position for Petitioner with Motorola.[5] (R2-79-267-69). To the contrary, there was undisputed evidence in the record that Motorola was in the process of downsizing employees and was not hiring anyone. (R2-79-266; R2-82-62). The record further revealed that Petitioner was ineligible for permanent employment with Motorola as she had not yet been in her temporary assignment for a year.[6] (R2-82-57-58). Since Petitioner was *never* eligible for permanent employment at Motorola in the first instance, her retaliation claim that she was denied permanent employment simply does not bear scrutiny. Accordingly, the findings and conclusions of the courts below that Petitioner was not retaliated against are both legally and factually correct. *See e.g.*, *Carter v. George Washington University*, 387 F.3d 872, 883 (D.C. Cir. 2004) (plaintiff who was not qualified for position sought failed to establish *prima facie* case of retaliation); *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001) (same). Consequently, the conflict regarding direct evidence in employment discrimination cases cannot be resolved based on the facts of this case. When the Petition for Writ of Certiorari is view under these circumstances, Petitioner is clearly requesting that this Court grant certiorari to write an opinion in an advisory capacity, which this Court expressly loathes. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) ("Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we

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5. The record shows that Laila Pennington made no hiring decisions regarding Petitioner or anyone else. (R2-83-101).

6. When Petitioner left her assignment at Motorola at the end of January, 2001, she had been employed there for about eight months. She had only been there five months when she first complained of any harassment in October 2000.

would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court.")

B. PETITIONER WAIVED DIRECT EVIDENCE ARGUMENTS.

At page 12 of the Petition for Writ of Certiorari, Petitioner asserts that Adecco employee Kathy Brodeur stated that Petitioner "was forced out due to continuing harassment" and that Thomas Karge made a written notation that Petitioner "resigned due to continuing harassment" and that both statements constitute direct evidence of constructive discharge and sexual harassment. Because Petitioner failed to argue in the courts below that there was direct evidence, she is now precluded from raising that issue in this Court in her Petition for Writ of Certiorari. *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (Supreme Court ordinarily does not consider issues "neither raised nor decided below"); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 1401, 47 L. Ed. 2d 701 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]"). As this Court has opined, "allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). Thus, Petitioner's arguments are not properly before this Court and must be rejected. *Clingman*, 544 U.S. at 598.

Not only are these arguments procedurally barred from this Court's consideration, but there was an independently sufficient ground for dismissing this claim as well. By her own admission, Petitioner states that at the time she resigned from her assignment at Motorola on January 31, 2001, the alleged harassment had been stopped for at least a month:

> Q. Okay. So [the alleged harasser] stopped touching you around late November, early December [2000]?
>
> A. Right.

(R2-79-304-306).

> Q. And let me just, so I'm clear, because I'm trying to get it clear in my head. Is it safe to say then after mid-December, [the alleged harasser] made no other comments to you about the size of your breasts or your hair growing because of sex, from mid-December through January 31st?
>
> *****
>
> A. After December 26th, was the last time that I ever spoke to [the alleged harasser].

(R2-78-165-66). Moreover, a week prior to her resignation on January 31, 2001, Motorola removed the alleged harasser from Petitioner's department, and placed him on a completely separate floor. (R3-153-7; R2-81-29; R2-78-119-20). Accordingly, Petitioner was not in fact subject to any hostile or unlawful conditions at the time she voluntarily left her

Motorola assignment. *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 80 (1998) (isolated incidents will not satisfy the severe and pervasive harassment standard); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (same).

Based on this undisputed record evidence, it was impossible for Petitioner to have sustained a constructive discharge claim with or without the alleged statements attributed Brodeur and Karge. Indeed, this Court has expressly held that to prevail on a claim of constructive discharge, the law requires that conditions be so unbearable that a reasonable person would feel compelled to resign. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2351, 2354 (2004) (a plaintiff may only succeed on a constructive discharge claim if she demonstrates that "working conditions [were] so intolerable that a reasonable person in [her] position would have felt compelled to resign.") Petitioner's claim does not meet this standard. More specifically, since the harassment had stopped and the harasser had been removed from Petitioner's department and work space, her work place was not so intolerable that it was reasonable for her to resign at that time.[7] *Id.*

Furthermore, while Petitioner may have ceased working at the Motorola facility, she was not in fact terminated or

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7. Moreover, Petitioner's chief motivation for leaving Motorola was not that she was still experiencing harassment, but the fact that the alleged harasser had not been terminated as a result of her complaints. (R2-78-118-19). Her dissatisfaction with Motorola's business decisions simply cannot sustain a claim of constructive discharge. *See Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1555 (11th Cir. 1997) ("Although [plaintiff] remains unsatisfied with [defendant's] resolution of her complaint, we have never stated . . . that a complainant in a discrimination action has a right to the remedy of her choice").

separated from her employment with Respondent Adecco. Indeed, upon Petitioner's departure from the Motorola facility, Adecco immediately found her another assignment with a different Adecco client. (R3-153-9; R2-78-170-71; R2-79-208-09; R2-82-119-20, 175, 227-28, 231-33). Thus, Petitioner remained in Adecco's employ and was not in fact "discharged," constructively or otherwise.

In sum, since Petitioner, by her own admission, was not suffering from any form of harassment at the time of leaving her assignment and by virtue of the fact that she was still employed by Adecco, it was not possible for Petitioner to sustain a viable claim for constructive discharge. No finding of direct evidence by the lower courts would have changed this outcome. Thus, this case will not, as Petitioner erroneously asserts, resolve the current conflict among the federal courts regarding direct evidence to apply in the employment discrimination context. Therefore, the Petition for Writ of Certiorari should be denied as to this issue. More importantly, Petitioner cannot fail to raise an issue in the courts below, wait to see which way the wind is blowing, and then shift gears before the appellate courts. *Cf. Taylor*, 503 U.S. at 646 ("allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."); *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983) (allowing amendment asserting new theory after district court dismissal "would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case . . . to take account of the court's decision . . . a practice which[ ] should not be sanctioned in the absence of compelling circumstances").

II. THE CIRCUITS APPLY *WHITE* UNIFORMLY

Petitioner's assertion that there is a split between the Eleventh Circuit and other courts of appeal regarding the interpretation of *White* is illusory. Rather, the Eleventh Circuit has expressly adopted this Court's analysis in *White* regarding Title VII retaliation cases:

> The Supreme Court recently addressed the adverse employment action element of a Title VII retaliation claim in [*White*]. The Court held that "the scope of Title VII's anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm" and therefore "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412-14. Thus, an employee need not show an adverse employment action (which was this circuit's pre-*Burlington Northern* retaliatory act standard), but rather, must show that "a reasonable employee would have found the challenged action materially adverse." *Id.* at 2415. In other words, the materially adverse employment action must discourage a reasonable employee from making or supporting a charge of discrimination. *Id.*

Crosby v. Mobile County Personnel Bd., Case No. 05-17039, 2007 WL 245126 (11th Cir. Jan. 30, 2007). *See also McAdams v. Harvey*, 213 Fed. Appx. 926, 927 (11th Cir. 2007); *Arnold v. Tuskegee University*, 212 Fed. Appx. 803, 810 n.4 (11th Cir. 2006) ("the plaintiff need not show that she suffered an action affecting the terms and conditions of her employment (which was this court's standard before *Burlington*

Northern)"). Accordingly, Petitioner's claims to the contrary notwithstanding, the Eleventh Circuit, like its sister circuits, undeniably follows the standard set forth in *White* for Title VII retaliation cases. *See, e.g., Strong v. University HealthCare System, LLC*, 482 F.3d 802, 808 (5th Cir. 2007) ("*Burlington* redefined an 'adverse employment action' to include actions by an employer that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"); *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006) ("an employer's action is adverse under Title VII if it 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," but "[t]he materiality of a claimed adverse action is to be determined objectively; 'petty slights, minor annoyances, and simple lack of good manners' will not deter 'a reasonable worker from making or supporting a charge of discrimination.'"). Therefore, the Eleventh Circuit is not at odds with other courts of appeals.

Not only is the Eleventh Circuit's test for adverse action consistent with *White* and decisions from other circuits, but the Eleventh Circuit also correctly applied *White* in the case *sub judice*. The Eleventh Circuit's holding that the alleged retaliatory acts were not retaliatory or were not acts that "would have been materially adverse to a reasonable employee" is completely consistent with this Court's opinion in *White*. As this Court opined in *White*, what constitutes an adverse action is expressed "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. ***Context matters***." *White*, 126 S. Ct. at 2415 (emphasis added). Accordingly, not all harms constitute actionable retaliation. *Id.* ("we believe it is important to separate significant from trivial harms."). Therefore, the Eleventh Circuit's holding that none of the alleged retaliatory acts were either motivated by Petitioner's complaint of harassment and/or materially adverse is entirely consistent with *White*.

Nevertheless, Petitioner challenges the lower courts' fact findings and analysis by arguing she was retaliated against when 1) she did not become a permanent Motorola employee; 2) she was docked pay, 3) given extra work and 4) she was terminated. These contentions are wholly without merit, namely because they are not supported by the fact findings from the lower courts, and she cannot prove that these alleged acts were either motivated by her protected conduct or materially adverse. For the following reasons, the Petition for Writ of Certiorari should be denied:

Permanent Employment with Motorola

Petitioner contends that she was retaliated against when she did not become a permanent employee of Motorola after complaining about harassment. More specifically, Petitioner opines that Karge told her that Pennington told him that Motorola would not hire her "because she complained too much." The Eleventh Circuit correctly held that these allegations cannot constitute retaliation because no action, materially adverse or otherwise, ever took place. First, the purported statements Petitioner attributed to Karge constitute inadmissible hearsay.[8] In fact, Petitioner concedes that no Motorola agent ever told her she would not be hired permanently because she engaged in protected activity. (R2-79-267-69). More significantly, in this

8. *Halloway v. Milwaukee County*, 180 F.3d 820, 825 (7th Cir. 1999) (multilevel statement was inadmissible hearsay because the employees informing the plaintiff of the alleged discriminatory statement did not act within their scope of duties in reporting the statement to the plaintiff); *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455-57 (11th Cir. 1997) (comments by low-level supervisors repeating management's discriminatory comments are inadmissible hearsay), *accord Rojas v. Florida*, 285 F.3d 1339, 1343 n.3 (11th Cir. 2002).

case, there is no evidence that *any decision* was made or *any action taken* with regard to Petitioner becoming a permanent Motorola employee. Accordingly, the Eleventh Circuit's grant of summary judgment is consistent with *White*, in which this court confirmed that some type of adverse action is required. *White*, 126 S. Ct. at 2415 (holding that discrimination, i.e., a "material adversity," is required to prove a *prima facie* case of retaliation); *see also McGowan v. City of Eufala*, 472 F.3d at 742 (affirming summary judgment on retaliation claim because no decision was made regarding the shift change). As no decision was made, Petitioner cannot meet the "material adversity" requirement.

The undisputed evidence shows that Motorola was in the process of downsizing its operations and was not taking on *any* permanent hires at the time of Petitioner's protected activity. (R2-79-266; R2-82-62). The record also shows that Pennington made *no hiring decisions* regarding Petitioner. (R2-83-101). Finally, Petitioner, having worked at the Motorola facility for less than a year, was *not eligible* for permanent employment at Motorola.[9] (R2-82-57-58). Thus, in the total absence of *any action* being taken for or against Petitioner regarding permanent employment with Motorola,

9. As of December 1999, a temporary worker was required to work at Motorola for at least a year before being considered for permanent employment. (R2-82-57-58). At the time Petitioner first complained of harassment in October 2000, she had only been working at the Motorola facility for five months. When she left at the end of January 2001, she had only been employed for about eight months. Therefore, Petitioner was well over four months shy of being eligible for permanent employment when she engaged in protected activity. *See, e.g., Carter v. George Washington University*, 387 F.3d 872, 883 (D.C. Cir. 2004) (plaintiff who was not qualified for position sought failed to establish *prima facie* of retaliation); *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 260 (5th Cir. 2001) (same).

there is not a materially adverse action for which either Respondent can be held liable.[10] As such, there is nothing inconsistent between the Eleventh Circuit's holding and this Court's decision in *White*.

Docked Pay & Extra Work

Petitioner asserts that she suffered a materially adverse action because she was "docked" pay one day when she left work early and on her last day at Motorola during which she performed no work. Petitioner's assertions are without merit. Petitioner admits that she was paid for the hours she worked on the day she left early. (R2-78-157-61). While Petitioner may have left early because she was "upset" about the harassment investigation "taking too long," there is no evidence that Petitioner was denied pay *because* she complained about harassment.[11] Being docked pay implies a

10. Again, for the Court to hold otherwise, it would have to overturn the lower courts' fact findings adverse to Petitioner.

11. Although Petitioner claims she was ill because she was upset with the investigation, Plaintiff's disagreement with Defendants' response to her complaints does not establish a violation of Title VII. *Farley v. American Cast Iron Pipe Co*,, 115 F.3d 1548, 1555 (11th Cir. 1997) ("Although [plaintiff] remains unsatisfied with [defendant's] resolution of her complaint, we have never stated . . . that a complainant in a discrimination action has a right to the remedy of her choice"). Moreover, Petitioner cannot complain about the reasonableness of the investigation if the employer's actions stop the harassment. *See Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1278 (11th Cir. 2003) ("[W]here the substantive measures taken by the employer are sufficient to address the harassing behavior, complaints about the process under which those measures are adopted ring hollow"); *see also Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304-05 (11th Cir. 2007) ("a reasonable result cures an unreasonable process. It does so because Title VII is concerned with preventing discrimination, not with perfecting process.").

basic entitlement in the first instance. Here, Petitioner was not paid *because she did not work the hours in question.* (*Id.*) There is no evidence in the record that Respondents were required to pay Petitioner for hours she did not work. If Respondents failed to pay for hours actually worked or deducted from hours worked, then, perhaps, the *Burlington* analysis would come into play. However, just as with the permanent employment issue discussed *supra*, there is no adverse action here in fact. Moreover, there is no retaliatory intent—Petitioner was not sent home because of her complaints, but *because she was "ill."* (R2-93-128). Similarly, Petitioner provided no proof, other than her own supposition, that she received more work than her counterparts. There is simply no evidence that work assignments were made based on any unlawful considerations.

Alleged Termination

Petitioner asserts that she was terminated from her Motorola assignment for complaining of harassment. This is not supported by the evidence. Adecco never terminated Petitioner from its employ. A week after Motorola completed its investigation of Petitioner's complaint *and* removed the alleged harasser from her department, Petitioner told her Adecco supervisor that she was dissatisfied with the outcome of the investigation and did not want to be assigned to Motorola any longer. Honoring her request, Adecco assigned Petitioner to work for CIGNA; however, she quit that assignment apparently because she did not like it. Thus, as indicated by the record, Adecco's act of reassigning Petitioner to another client was simply an attempt to accommodate her obvious disdain for her Motorola supervisor and coworkers. There was no other solution, as far as Adecco was concerned,

since Petitioner did not like working with Pennington and the only other option would be to work in the department to which the harasser had been moved. In the totality of the circumstances, it is disingenuous and unreasonable, to claim that such reassignment was an act of retaliation, especially when Adecco went above and beyond in helping Petitioner secure other employment opportunities, including a permanent job with United Healthcare. *See Higgins v. Gonzales*, 481 F.3d 578, 590 (8th Cir. 2007) (holding that a transfer was not materially adverse under *White* where transfer came after plaintiff's two-year term position ended and she was offered and accepted a new position).

As such, the Eleventh Circuit's decision finding that the alleged retaliatory acts were either not retaliatory or not materially adverse is consistent with the analysis in *White* and decisions by other circuits. Indeed, Petitioner's ***own*** cases cited in support of her Petition for Writ of Certiorari support the Eleventh Circuit's holding and confirm that there is ***no*** conflict among the circuits. *See Rivera-Martinez v. Commonwealth of Puerto Rico*, 2007 WL 16069 (1st Cir. 2007) (affirming summary judgment on retaliation claim because plaintiff cannot show that she was harassed after her protected activity); *Ccicsmann v. Sallada*, 2006 WL 3611729 (4th Cir. 2006) (affirming summary judgment on retaliation claim because the plaintiff failed to show any material harm); *Schmidt v. Canadian Nat'l Ry. Corp.*, 2007 WL 755171 (7th Cir. 2007) (affirming summary judgment on retaliation claim because altering the plaintiff's work schedule to make it start and end one hour later, forcing him to use vacation time, and changing his duties were not materially adverse under the particular circumstances of the case); and *McGowan v. City of Eufala*, 472 F.3d at 742 (affirming summary judgment on retaliation claim because

the denial of a shift change and harassment failed the test of materiality). Accordingly, there is no split among the circuits warranting review by this Court. *See also Higgins*, 481 F.3d at 590 (holding that lack of mentoring and a transfer were not materially adverse under *White* where plaintiff was not negatively impacted by lack of supervision and transfer came after her two-year term position ended and she accepted a new position with the employer); *Strong*, 482 F.3d at 809 (holding that *White* did not affect analysis of retaliation claim because plaintiff did not prove but for causation). Therefore, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

As demonstrated above, this case is not properly postured to resolve the apparent conflict among the federal courts as to what standard of direct evidence to apply in the context of employment discrimination cases. Furthermore, the Eleventh Circuit complied with this Court's remand and Petitioner has otherwise failed to present any other conflict or compelling legal question warranting this Court's consideration. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CURTIS L. MACK
Counsel of Record
BRENNAN W. BOLT
McGUIREWOODS LLP
Attorneys for Respondent
Adecco USA, Inc.
1170 Peachtree Street NE
Suite 2100
Atlanta, Georgia 30309
(404) 443-5500